Supreme Court, U.S.
FILED
SEP 22 2000
CLERK

No. 00-292

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

vs.

CITIZEN POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Opinion Below by the Oklahoma Court of Civil Appeals has been decided in a way that conflicts with *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I, § 8, cl. 3.

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

On August 25, 1993, C&L Enterprises, Inc., ("C&L"), Petitioner, signed an "Abbreviated Form of Agreement Between Owner and Contractor" (1987 edition)[1] copyrighted by the American Institute of Architects ("AIA") to construct a foam roof on a building located on land[2]

[1] A copy of this document was attached as Plaintiffs' Exhibit A to the petition. *See* App. 32.

[2] The building is located on land owned by the Potawatomi that has not yet been taken into trust by the United States. The land is "restricted Indian land." 25 U.S.C. § 177. As restricted Indian land, the consent of the United States is a prerequisite to alienation.

owned by the Citizen Potawatomi Nation ("Potawatomi") for $85,000.

On March 14, 1994, after learning that birds had eaten holes in a foam roof at another project, the architect determined that the roof should be rubberguard, not foam. On April 19, though lacking the ability to build a rubberguard roof, C&L offered to lower the foam roof price by $6,600, allegedly signed a contract with a subcontractor who would build the rubberguard roof, and submitted an offer that was $21,616 higher than the price charged by the contractor who ultimately constructed the rubberguard roof for $56,784.

On January 24, 1995, though C&L never initiated any work, C&L submitted the foam roof agreement to an arbitrator. Upon receiving notice of the arbitration, the Potawatomi notified the arbitrator in writing that the Potawatomi were asserting sovereign immunity, had numerous substantive defenses to the arbitration claim,[3] but had no intention of waiving immunity by participating in the arbitration proceedings.

On June 30, 1995, the arbitrator entered a default award of $25,400 plus attorney's fees and costs. The arbitration award does not mention tribal sovereign

[3] 25 U.S.C. § 81 requires any agreement with an Indian tribe for the payment of money "in consideration of services for said Indians relative to their lands" to have the approval of the Secretary of the Interior endorsed thereon. Absent such endorsements, an agreement is "null and void." The C&L foam roof agreement was not so endorsed.

immunity nor explain how the amount of the award was computed.[4]

On August 7, C&L filed suit[5] in the District Court for Oklahoma County to confirm the default arbitration award. The Potawatomi specially appeared and moved to dismiss based on sovereign suit immunity.[6] Without a hearing, the District Court denied the Potawatomi motion to dismiss [App. 25] and a subsequent motion for reconsideration. App. 24. These orders do not articulate any putative basis for the District Court's exercise of jurisdiction over the Potawatomi but simply state: "Overruled" and "Denied." The Potawatomi promptly sought a writ of prohibition from the Oklahoma Supreme Court.[7]

On October 27, a week after the Potawatomi filed for a writ of prohibition, the District Court entered a default

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[4] A copy of the arbitrator's award is Exhibit B to the Petition. *See* App. 61. C&L has subsequently suggested that the damages awarded by the arbitrator were based on the difference between the C&L agreement price ($85,000) and the subcontractor's price. *See, e.g.*, "Answer Brief of Appellee" at 2. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.* No. 86,568 (Okla. Sup. Ct. filed July 3, 1996).

[5] *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, Case No. CJ-95-5204-62 (Okla. Co. Dist. Ct. filed Aug. 7, 1995) ("Petition for Confirmation of Arbitration Award"). App. 28.

[6] App. 26. In the supporting brief, the Potawatomi raised both sovereign immunity and the 25 U.S.C. § 81 deficiency. *See* "Brief in Support of Motion to Dismiss," at 5, n. 17 (filed Aug. 25, 1995).

[7] *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Freeman*, No. 86,401 (Okla. Sup. Ct. filed Oct. 20, 1995) (petition for writ of prohibition).

judgment against the Potawatomi for $28,414.67. App. 21. Subsequently, the Oklahoma Supreme Court refused to grant a writ of prohibition[8] and the Potawatomi timely appealed to the Oklahoma Supreme Court.[9]

On March 21, 1996, C&L obtained a second default judgment from the District Court for $10,545 in attorney's fees and costs.[10]

On November 5, the Court of Appeals affirmed the District Court judgments holding that "*Hoover*[11] directly controls on the issue of tribal immunity"[12] and that the Potawatomi waived any other defects in C&L's cause of

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[8] *See id.* at Order, Dec. 13, 1995.

[9] The Potawatomi asserted, *inter alia*, that the District Court erred by purporting to exercise jurisdiction over an unconsenting Indian tribe and in enforcing a contract not endorsed as required by 25 U.S.C. § 81. *See, e.g.*, "Brief of Appellant," at 18. *C&L Enterprises, Inc. v. Citizen Band Potawatomi*, No. 86,568 (Okla. Sup. Ct. filed May 24, 1996).

[10] App. 18. This judgment was also appealed. Most of the work allegedly supporting C&L's fees was performed post judgment in other litigation. Nevertheless, the trial court entered an award for all of the attorney's fees claimed by C&L. Of the fees awarded, 72% ($7,620) were for services allegedly performed post judgment. The attorney fee judgment is patently untenable coming in a case where no contested hearings were held and judgment was entered by default. Attorney fees were 35% of the judgment entered by the District Court.

[11] *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 517 U.S. 1188 (1996).

[12] App. 14. "The *Hoover* court held that a 'contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian country.' 909 P.2d at 62."

action or C&L's claim for attorney's fees by allowing judgments to be entered by default. App. 14-15.

The Potawatomi timely petitioned the Oklahoma Supreme Court for review by *certiorari*. This petition was denied January 27, 1997. The Potawatomi then timely appealed to this Court. On June 1, 1998, this Court granted the Potawatomi petition for *certiorari*, vacated the judgment of the Oklahoma Court of Civil Appeals and remanded the case "for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 [(1998).]"[13] *Citizen Potawatomi Nation v. C&L Enterprises, Inc.*, 524 U.S. 901 (1998). App. 8.

On February 8, 2000, the Oklahoma Court of Civil Appeals, Division 2, issued an opinion reversing the judgment of the District Court for C&L and remanding with instructions to sustain the Potawatomi motion to dismiss filed August 25, 1995.

> In this instance, the contract does not expressly waive Tribe's sovereign immunity. The agreement of Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction, seem to indicate a willingness on Tribe's part to expose itself to suit on the contract. However, the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression.

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[13] On July 1, 1998, the Clerk of the United States Supreme Court advised the Clerk of the Court of Civil Appeals of Oklahoma that the Potawatomi "is given recovery of costs in this Court" of "Clerk's costs" in the amount of $300 that "may be collected through the Court of Civil Appeals of Oklahoma, Second Division, or from opposing counsel or parties."

> We conclude that the record does not support a finding of express waiver of immunity on the part of the Citizen Band Potawatomi Indian Tribe of Oklahoma. Therefore, we reverse the judgement of the district court, including the order granting prevailing party attorney fees under 12 O.S. 1991, § 936, and remand with instructions to sustain the motion to dismiss of Tribe.

App. 7. Following unsuccessful appeals at the state court level, C&L has appealed to this Court.

REASONS FOR DENYING THE WRIT

A petition for writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. C&L has raised only one potentially valid reason for granting the writ: an alleged conflict between the Opinion Below and cases from other states and federal circuit courts of appeal. This stated reason is not compelling because the Opinion Below is consistent with this Court's sovereign immunity jurisprudence and with this Court's disposition of this case in prior proceedings.

ARGUMENT

C&L, though it never performed any work for the Potawatomi,[14] has been pursuing the tribe for more than

[14] Pet. at 7.

five years, forcing the tribe to expend resources on wasteful – now, arguably, frivolous – litigation. C&L's petition should be denied, *inter alia*, because it asks this Court to reconsider questions presented by C&L in prior proceedings before this Court. Moreover, although "courts have consistently determined that the interpretation of Indian law is a matter of federal law,"[15] C&L urges this court to abandon "nearly two hundred years of recognizing sovereign immunity's extra-territorial reach"[16] and to subject tribes to the reach of state courts without a clear waiver of sovereign immunity. C&L bases its arguments on case law filled with outdated, dubious reasoning and unsolicited paternalism. C&L cites no controlling authority decided or enacted since the prior proceedings before this Court that demonstrate any error in the Opinion Below.

Proposition: The Opinion Below is consistent with *Kiowa Tribe v. Manufacturing Technologies, Inc.*

An Indian tribe is immune from suit unless the tribe has clearly waived sovereign immunity. "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional

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[15] *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024, 1029 (D. Ariz. 1993) (contractor's suit for breach of contractor in state court enjoined).

[16] *In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992), *cert. denied*, 510 U.S. 1039 (1994).

abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (although tribe consents to court's jurisdiction to claims brought by it, that consent does not waive sovereign immunity for counterclaims brought against it).

Similarly, unless agreed to by an Indian tribe, a state court generally has no jurisdiction over that tribe. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 61-62 (1996):

> If anything, the Indian Commerce Clause[17] accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the states still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

In prior proceedings in this litigation, this Court granted the Potawatomi petition for *certiorari*, vacated a state court decision in favor of C&L and remanded to the Oklahoma Court of Civil Appeals "for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 [(1998).]" App. 8. In *Kiowa Tribe*, this Court reversed a decision of the Oklahoma Court of Civil Appeals, stating that:

> Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not

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[17] U.S. CONST. art. I, § 8, cl. 3.

> abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Kiowa Tribe, 523 U.S. at 760.

In *Kiowa Tribe*, this Court explicitly rejected the notion that sovereign immunity contains a territorial component, *i.e.*, that sovereign immunity is waived if a contract is executed or is to be performed outside a tribe's reservation or trust lands. The decision also dispelled the notion that a tribe waives sovereign immunity merely by engaging in commercial activity.

On remand from this Court, the Court of Civil Appeals entered the proper order – indeed, the only order it could enter consistent with this Court's mandate on remand[18] – and dismissed C&L's claims for lack of jurisdiction over the Potawatomi. The Court of Civil Appeals correctly recognized that the Potawatomi had

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[18] When, as in the prior proceedings in this litigation, the Court issues an order granting certiorari, vacating the judgment below and remanding the case (a "GVR" order), it does so in part to "assist[ ] the court below by flagging a particular issue that it does not appear to have fully considered." *Lawrence v. Chatter*, 516 U.S. 163, 167 (1996).

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Id.

not waived immunity, and, absent a waiver, Oklahoma could not exercise jurisdiction over the tribe.

> In this instance, the contract does not expressly waive Tribe's sovereign immunity. The agreement of Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction, seem to indicate a willingness on Tribe's part to expose itself to suit on the contract. However, the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression.

App. 7. Not only is the Opinion Below consistent with *Kiowa Tribe* and this Court's mandate on remand, but it is consistent with this Court's longstanding sovereign immunity jurisprudence.[19]

C&L's sole proposition is that "[t]he Oklahoma Court of Civil Appeals declined to enforce the arbitration agreement contrary to the opinions of other state and federal courts consistently finding such agreements waive sovereign immunity."[20]

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[19] A tribes's immunity from suit "is a necessary corollary to Indian sovereignty and self-governance. * * * tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986). Even assuming, *arguendo*, the Court of Civil Appeals used a too-strict sovereign immunity analysis, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

[20] Pet. at 11. In the "Constitutional and Statutory Provisions Involved" portion of its brief, C&L cites several Oklahoma statutes concerning arbitration. Pet. at 2. These provisions are not discussed anywhere in the brief.

The cases upon which C&L relies provide only superficial support for its theories. First, all but one of the cases predate this Court's decision both in this litigation and in *Kiowa Tribe*.[21] Second, C&L relied on these cases in the prior proceedings before this Court that were resolved in favor of the Potawatomi.[22] The standard against which to evaluate the judicial soundness of the Opinion Below is this Court's pronouncements on the subject of sovereign immunity, not older cases from lower courts.[23] This Court

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[21] *Val-U Construction v. Rosebud Sioux Tribe*, 146 F.3d 573 (8th Cir. 1998) was decided approximately one week after this Court's decision in *Kiowa Tribe*.

[22] In its opposition brief in Case No 96-1721, C&L cited *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995), *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996), *Val/Del, Inc., v. Superior Court*, 703 P.2d 502 (Ariz.App. 1985), and *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) for the same propositions asserted herein.

[23] The Opinion Below is consistent with a growing body of post-1998 Oklahoma case law upholding tribal sovereign immunity based on this Court's decision in *Kiowa*. *See Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 1998 OK 126, 975 P.2d 450, 451 ("[T]ribal immunity is a matter of federal law and is not subject to diminution by the States. * * * Enforcement of such a judgment could result in the state's diminution of tribal immunity.") (decision on remand from U.S. Supreme Court); *Hoover v. Kiowa Tribe of Oklahoma*, 1999 OK 6, 986 P.2d 516, 517 ("as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. * * * Tribal immunity is a matter of federal law and is not subject to diminution by the States.") (citing *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 760 (1998), quoting *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)).

need not speak[24] to the relevance of the arbitration agreement because it has already spoken.

C&L has not cited any case law or congressional action since the prior proceedings before this Court that would cause this Court that demonstrate that the Opinion Below is inconsistent with this Court's mandate on remand, its decision in *Kiowa Tribe* or its established sovereign immunity jurisprudence. Absent a showing of such conflict, C&L has failed to demonstrate a compelling reason to grant its petition for certiorari.

C&L implies that the critical contract provisions, including the arbitration clause, were drafted by the Potawatomi.[25] This is not accurate. The agreement at issue is a form contract copyrighted by the American Institute of Architects ("AIA") in 1987. Paragraph 10.8 of article 10 ("Administration of Contract") contains the sentence: "The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." The arbitration clause, one of eight paragraphs in the tenth of 20 articles, is part of a standard form that was not tailored in any way for an Indian tribe.

C&L wants this arbitration clause to serve double duty: first to authorize arbitration, and second, to be an explicit waiver of suit immunity. The clause authorizes arbitration. To construe the clause as an express waiver of immunity when waiver and immunity are not mentioned

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[24] Pet. at 21-22.

[25] Pet. at 6, 11.

would effectively rewrite the contract contrary to law.[26] "If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations." *Simpson v. United States*, 172 U.S. 372, 379 (1899).

The language in the arbitration clause cited by C&L is not an unambiguous waiver of sovereign immunity but merely provided that the award would be enforceable "in accordance with applicable law **in any court having jurisdiction thereof.**"[27] This language is not an explicit waiver of suit immunity. It is clearly not a grant of jurisdiction to any particular court.[28] Because the Potawatomi have not waived suit immunity for claims under the C&L agreement, no court "has jurisdiction thereof." Under the applicable law announced by this Court, C&L's suit must be dismissed.

C&L's comments that the Potawatomi were "represented by counsel [during arbitration proceedings] and repeatedly corresponded" with the American Arbitration

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[26] The contract terms are not ambiguous; the contract simply contains no waiver of sovereign immunity. To read a waiver of sovereign immunity into a contract that otherwise does not discuss sovereign immunity would go beyond the plain language of the contract in violation of Oklahoma law. *See Founders Bank & Trust Co. v. Upsher*, 1992 OK 35, 830 P.2d 1355, 1361-1362.

[27] Pet. at 6; App. 46-47 (emphasis added).

[28] "There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

Association in this matter[29] gain it nothing. The extent to which this Court will require an explicit waiver is evidenced by its decision in *Oklahoma Tax Comm'n v. Potawatomi Tribe, supra.* In that case, the Oklahoma Tax Commission acknowledged that Indian tribes generally enjoy sovereign immunity, but argued that the Potawatomi waived their sovereign immunity by seeking to enjoin the Commission's proposed tax assessment. This Court held that a tribe "does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." *Id.*, 523 U.S. at 509. This is true even if the counterclaim is compulsory. *Id.*

Although C&L may be correct that an effective waiver does not require the recitation of any particular incantation or the invocation of any special words, a defendant tribe must have demonstrated the intent to waive immunity by more than merely signing a form contract. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States v. Testan*, 424 U.S. 392, 399, 47 L.Ed.2d 114, 96 S.Ct. 948 (1976), quoting *United States v. King*, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct. 1501 (1969)." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). The phrase "unequivocally expressed" can have no meaning if a standard form arbitration clause that neither

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[29] Pet. at 7. The Potawatomi asserted sovereign immunity in correspondence with the arbitrator, but the arbitrator never replied or articulated why sovereign immunity might not apply. App. 61.

mentions Indian tribes, suit immunity, or waiver is considered to be an "unequivocally expressed" waiver of tribal suit immunity.

The Opinion Below notes that "another reasonable implication of the language of the contract might be that the Tribe's own courts are the 'court[s] having jurisdiction thereof' mentioned in the contract." App. 7 n. 1. This footnote reflects the fact that a clear, unambiguous waiver for suit in Oklahoma's state courts cannot be found in the contract language upon which C&L relies. This need to speculate renders the contract language unusable and impermissible as a waiver of immunity. Because a waiver is not clearly expressed, the Court would have to infer a waiver of tribal sovereign immunity contrary to its own controlling decisions.

C&L would have this Court strip the words "clear" and "unequivocal" of any meaning and overrule its prior decisions that a waiver cannot be inferred. At a minimum, a clear and unequivocal waiver of sovereign suit immunity would include the words "waiver" and "suit immunity" and be in a clause labeled "waiver," not in a clause labeled "Administration of the Contract."

Indian tribes are immune from unconsented suit. Such consent must be clear and unambiguous. C&L can point to no clear, unambiguous waiver of sovereign immunity in the contract upon which it bases its claim. Absent a waiver, C&L's claim must fail.

C&L cites *Val-U Construction v. Rosebud Sioux Tribe*, 146 F.3d 573 (8th Cir. 1998), where the Eighth Circuit found that an arbitration clause waived immunity. Pet. at 7. The Eighth Circuit's decision in *Val-U Construction* is

proof of the adage that "bad facts make bad law." Unlike C&L,[30] Val-U Construction had performed a substantial amount of work for the defendant tribe when the tribe terminated the contract.[31]

The Eighth Circuit tried to distinguish the *Val-U Construction* decision from its earlier decision in *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*,[32] by stating that the contract in *Val-U Construction* designated an arbitral forum to settle all disputes. *Val-U Construction* at 577. C&L urges this Court to use this

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[30] C&L never performed *any* service for the Potawatomi under the agreement. Pet. at 7.

[31] The decision in *Val-U Construction* is inconsistent with law from the Tenth Circuit and other federal courts. *See, e.g., Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982) (tribal defendants did not expressly waive sovereign immunity of tribal authorities by agreeing to attorney fee clause in construction contract, consenting to partial summary judgment with respect to certain disputed sums owed under the contract, or including "sue or be sued" clause in tribal corporate charter). Where waivers have been found, the waivers have been explicit. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) (tribal council passed formal resolution, approved by the Secretary of the Interior, expressly waiving sovereign immunity) and *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 786 (9th Cir. 1986) (tribal bingo agreement expressly "waive[d] sovereign immunity" for actions brought to enforce or interpret contract).

[32] 780 F.2d 1374, 1380 (8th Cir. 1985) (promissory note reserving "rights and remedies provided by law" in favor of lender, providing for attorney fees in the event of a collection action, and containing a conflict of laws provision did not constitute express waiver of promisee tribe's sovereign immunity).

distinction as a basis to find in its favor. However, as noted above, the arbitration clause at issue herein merely stated than any arbitration award would be enforced "in accordance with applicable law **in any court having jurisdiction thereof.**" Because the Potawatomi did not expressly consent to suit in the District Court for Oklahoma County, the trial court did not have "jurisdiction thereof."

C&L also cites *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996). Pet. at 18-20. In *Sokaogon*, the Seventh Circuit found an effective waiver of sovereign immunity in an arbitration clause similar to the one at issue herein.

> Here the only purpose that a requirement of a clear statement could serve would be the admittedly, perhaps archaically, paternalistic purpose of protecting the tribe against being tricked by a contractor into surrendering a valuable right for insufficient consideration. We do not find this or any other purpose articulated in the cases, and **this leads us to doubt whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit,** especially since the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions.

Sokaogon, supra at 659-660 (emphasis added).

The Seventh Circuit's "doubt" about the explicitness required to find a waiver of suit immunity was subsequently put to rest by this Court in *Kiowa Tribe v. Manufacturing Technologies, Inc., supra*. This Court has vacated and remanded other cases from the Oklahoma Supreme

Court based on similarly paternalistic reasoning.[33] Even were case law from the Seventh Circuit controlling, its reasoning in *Sokaogon* is not persuasive.

C&L also relies on state cases[34] that misconstrued a Ninth Circuit case to reach a result that, as the Ninth Circuit subsequently held, is inconsistent with federal law. The Ninth Circuit decision[35] held that an Indian tribe waived suit immunity "by intervening as a party plaintiff and subsequently entering into a fishing conservation agreement which provided, among other things, that the parties to the agreement would submit all future disputes to the Oregon district court for resolution."[36] The Ninth Circuit later recognized that state courts (Alaska and Arizona)[37] had misconstrued its pronouncement on arbitration clauses and reiterated that waivers of suit immunity cannot be implied but must be clear and unequivocal. A finding that an arbitration clause is a waiver of tribal sovereignty "runs counter to not only the strong presumption against tribal waivers of immunity,

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[33] *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 1997 OK 62, 939 P.2d 1143, 1147 (rejecting the argument "that Oklahoma's judicial power can only be extended over her Indian tribes upon express tribal or congressional consent"); vacated and remanded *sub nom Kiowa Tribe v. Aircraft Equip. Co.*, 524 U.S. 901 (1998).

[34] Alaska [*Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983)] and Arizona [*Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz. App. 1985)].

[35] *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981).

[36] *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

[37] *Id.* at 419-20.

but also generally accepted principles governing the interpretation of contractual arbitration provisions." *Id.* at 419. Because of the "strong presumption against waivers of tribal sovereign," the Ninth Circuit refused "to imply a waiver of sovereign immunity * * * by entering into * * * [an] arbitration clause." *Id.* at 420. Nothing remotely similar occurred here. The Potawatomi have consistently and unmistakenly asserted their sovereign immunity to the arbitrator, to the state district court, and to the state appellate courts. They have never intervened in any litigation. In any event, these state cases cannot overrule United States Supreme Court decisions holding that it is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.

CONCLUSION

C&L's Petition for Certiorari should be denied.

Respectfully submitted,

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